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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 469

PACIFIC EMPLOYERS INSURANCE COMPANY, *Petitioner*,
v.
REED ROLLER BIT COMPANY, *Respondent*

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Fifth Circuit

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SUBJECT INDEX

OPINION BELOW	1
JURISDICTION	1
TWO QUESTIONS PRESENTED	2
STATEMENT	2
INSURANCE POLICY PROVISIONS	3
FACTS OF ACCIDENT	5
REASONS FOR GRANTING THE WRIT	6
CONCLUSION	11

LIST OF AUTHORITIES

Baker v. Maryland Casualty Co., 56 Atl. 2d 920 (Sup. Ct. R.I.)	9
Berger Bros. Electric Motors, Inc., v. New Amsterdam Casualty Co., 58 N.E. 2d 717 (N.Y.)	10
Carter v. Nehi Beverage Co., 68 N.E. 2d 622 (App. Ct. of Ill.)	8
Farmers Cooperative Society No. 1 v. Maryland Casualty Co., 135 S.W. 2d 1033	7
Foster Trailer Co. v. United States Fidelity & Guaranty Co., 228 S.W. 2d 107 (1950)	10
Hultquist, et al., v. Novack, 278 N.W. 524 (Sup. Ct. Minn.)	8
Hutchinson Gas Co. v. Phoenix Indemnity Co., et al., 288 N.W. 847 (Sup. Ct. Minn., 1939)	8, 10
Kelley-Dempsey & Co. v. Century Indemnity Co., 77 F. 2d 85 (10th Cir.)	10
Loveman, Joseph & Loeb v. New Amsterdam Casualty Co., 173 So. 7 (Sup. Ct. Ala.)	8
Lyman Lumber & Coal Co. v. Travelers Ins. Co., 289 N.W. 40	8
Smith v. U. S. Fidelity & Guaranty Co., 6 N.W. 2d 81 (Sup. Ct. Nebr.)	10
Standard Accident Insurance Co. v. Roberts, et al., 132 F. 2d 794	8
U. S. Fidelity & Guaranty Co. v. Reinhart & Donovan Co., 171 F. 2d 681	9

STATUTES

28 U.S.C., Sec. 1254	2

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To The Honorable Supreme Court of the United States:

Pacific Employers Insurance Company prays that a writ of certiorari issue to review the judgment entered in this case on July 31, 1952, by the United States Court of Appeals for the Fifth Circuit.

Opinion Below

The opinion of the Court of Appeals (R. 51-56) is reported at 198 F. 2d 1.

Jurisdiction

The judgment of the Court of Appeals was entered on July 31, 1952 (R. 57), and Motion for Rehearing was

timely filed on August 16, 1952 (R. 58), and denied by the Court on September 4, 1952 (R. 65). The jurisdiction of this Court is invoked under 28 U. S. C., Sec. 1254.

Two Questions Presented

1. Whether a liability insurance policy issued to a manufacturer covering "Premises-Operations", but excluding accidents arising from the handling of its products by others, protected the manufacturer from an accident that occurred from the disintegration of an emery wheel while a workman in a plant was using a pneumatic grinding machine made and distributed by the manufacturer.

2. Whether a liability insurance policy issued to a manufacturer covering "Premises-Operations", but excluding accidents occurring after completed or abandoned operations away from the manufacturer's premises, protected the manufacturer from an accident that occurred from a negligent representation by a salesman as to the safety of one of its products for a certain use, which representation was made away from the manufacturer's premises and prior to the accident.

Statement

Respondent, Reed Roller Bit Company (hereafter called Reed) was the plaintiff below. Reed sued petitioner, Pacific Employers Insurance Company (hereafter called the Insurance Company), upon a policy of liability insurance issued by it to Reed. Reed sought recovery for money it had paid to settle a suit against it by one Johns for damages for personal injuries. Reed also sought its expenses and attorneys' fees in handling the Johns suit, claiming that the insurance policy obligated the Insurance Company to pay all such items (R. 5-23). The Insurance Company, contending that

the Johns claim and suit were excluded from the coverage of the policy, filed its Motion to Dismiss for failure to state a claim upon which relief could be granted (R. 24-29). The trial court at first sustained the motion only in part (R. 29-35), but thereafter, when Johns' Declaration against Reed for damages was stipulated and incorporated in Reed's Complaint, (R. 35-44), the trial court sustained the Insurance Company's Motion (R. 44-46), holding that the Johns claim and suit were excluded from the coverage. The Court of Appeals for the Fifth Circuit reversed the trial court and remanded the case for trial (R. 57), holding that the insurance policy covered the Johns claim and suit (R. 51-56—198 F. 2d 1).

The Declaration by Johns against Reed sets out the facts concerning the accident and the alleged negligence of Reed and, for purposes of the motion to dismiss, are assumed to be true (R. 35-44). The insurance policy was attached to Reed's complaint (R. 35-44).

Insurance Policy Provisions

The coverage that could be provided under the form of the policy was dependent upon the hazards against which the insured wanted protection and for which it paid the required premium. Any one, or any combination of one or more of five different hazards could be insured against provided a premium was paid for each such hazard against which the insured desired protection. If no premium was paid for a defined hazard, no protection against that hazard was afforded (R. 20). These hazards that were specifically defined in the policy were (1) Premises-Operations, (2) Elevators, (3) Independent Contractors, (4) Products, and (5) Contractual (R. 20). Of these hazards, Reed paid a premium for the hazard of "Premises-Operations" only. It

did not pay a premium for the "Products" hazard. One of the plainly labeled exclusions provided that there was excluded from the coverage of the "Premises-Operations" hazard anything that could have been covered under the "Products" hazard. We need then to look only to the definition of the "Products" hazard to see if the Johns accident was excluded.

Aside from the first page of the policy which shows that Reed purchased and paid a premium for the "Premises-Operations" hazard only, the pertinent policy provisions are the following:

"PACIFIC EMPLOYERS INSURANCE COMPANY

A California Corporation

(Herein Called the Company)

DOES HEREBY AGREE with the assured, named in the declarations made a part hereof, in consideration of the premium and of the statements contained in the declarations and subject to the limits of liability and other terms of this policy:

"INSURING AGREEMENTS

1. Coverage A—Bodily Injury Liability. To pay on behalf of the assured all sums which the assured shall become obligated to pay by reason of the liability imposed upon him by law for damages, including damages for care and loss of services, because of bodily injury, sickness, or disease, including death at any time resulting therefrom, sustained by any person or persons, caused by accident and arising out of the hazards hereinafter defined."

* * *

"DEFINITION OF HAZARDS

Division 1. Premises—Operations. The ownership, maintenance or use of the premises, and all operations

during the policy period which are necessary or incidental thereto."

* * *

"Division 4. Products. The handling or use of or the existence of any condition in goods or products manufactured, sold, handled or distributed by the named assured, if the accident occurs after the assured has relinquished possession thereof to others and away from premises owned, rented or controlled by the assured; and operations covered under divisions 1 and 3 of the Definition of Hazards, other than pick-up and delivery and the existence of tools, uninstalled equipment and abandoned or unused materials, if the accident occurs after such operations have been completed or abandoned at the place of occurrence thereof and away from such premises."

* * *

"EXCLUSIONS

"This policy does not apply:

* * *

(d) under divisions 1 and 3 of the Definition of Hazards, (1) to liability with respect to which insurance is or can be afforded under division 4 of the definition of Hazards, * * * *"

Facts of Accident

Reed manufactured and distributed a pneumatic grinding machine. Johns' employer in Baltimore purchased such a machine from a supply company there to remove excess welding material. A Reed saleman in Baltimore recommended to Johns' employer that an emery wheel manufactured by another concern (also a party defendant in Johns' suit), when used with Reed's grinding machine, was safe for the removal of excess welding material. This representation was made "sometime immediately prior" to Johns' accident. Such wheels were purchased by Johns' employer and Johns

was assigned to remove excess welding material with such a wheel attached to the grinding machine of Reed's manufacture. While so doing, the wheel disintegrated and caused the injuries for which Johns sought damages.

One ground of negligence alleged by Johns against Reed was negligence in the "manufacture or inspection or testing" of the grinding machine. As a basis for recovery from the Insurance Company, Reed abandoned this in the trial and appellate courts, conceding that coverage was not afforded for negligence in the "manufacture or inspection or testing".

Another ground of negligence alleged by Johns against Reed was in the representations of its salesman that the wheel and grinding machine were safe to use as a unit.

The trial court held in two memorandum opinions (R. 29-35; 44-46) that the exclusion of accidents that could have been covered under the hazard "Products" operated to exclude the Johns claim and suit from the coverage.

The Court of Appeals, after stating the facts about as we have herein, and after recognizing that any accident that could have been covered under the hazard "Products" was excluded from the hazard "Premises-Operations", nevertheless held there was coverage because the representation of the salesman was not "completed" until acted upon by Johns. The Court of Appeals apparently considered only the second clause of the exclusion for "completed" operations, for it did not write a word on the first clause excluding accidents from the handling or use of Reed's manufactured products by others.

Reasons For Granting The Writ

1. (First Question, supra). The Court of Appeals has erroneously construed an insurance policy contract though the contract is plain and the Court does not even intimate

that it is ambiguous. In so doing, it has not only extended the coverage of the contract to include "Products" for which no premium was paid, but has decided an important question of Texas law contrary to a previous Texas decision, to-wit, FARMERS COOPERATIVE SOCIETY NO. 1 v. MARYLAND CASUALTY COMPANY, 135 S.W. 2d 1033. This case, decided upon a manufacturer's liability insurance contract very similar to the case at bar, held that an accident that occurred to a filling station customer at his home two hours after he had sought to purchase kerosene, but got gasoline by mistake, was within the exclusion for accidents caused directly or indirectly by the use of products distributed by the filling station away from the assured's premises.

The error of the Court of Appeals is easily demonstrated by placing the facts of Johns' accident in juxtaposition with the first clause of the exclusion thus:

FACTS	EXCLUSION
1. Johns' accident occurred while he was handling and using a pneumatic grinding machine.	1. "Products. The handling or use of or the existence of any condition in * * * "
2. Such machine was manufactured, sold, handled, and distributed by Reed.	2. " * * * goods or products manufactured, sold, handled, or distributed by the named assured, * * * "
3. The accident occurred after Reed had relinquished possession of and sold the grinder to its distributor and, in turn, to Johns' employer and to Johns who was in possession when the accident occurred.	3. " * * * if the accident occurs after the assured has relinquished possession thereof to others * * * "
4. The accident occurred upon the premises of Johns' employer and not upon any premises of Reed.	4. " * * * and away from premises owned, rented or controlled by the assured; * * * "

Upon similar facts and policy contracts, the exclusion was applied in the following cases: HULTQUIST, ET AL., v. NOVACK (Ocean Accident & Guarantee Corporation, Garnishee), 278 N.W. 524 (Sup. Ct. Minn.); LOVEMAN, JOSEPH & LOEB v. NEW AMSTERDAM CASUALTY COMPANY, 173 So. 7 (Sup. Ct. Ala.); HUTCHINSON GAS CO. v. PHOENIX INDEMNITY CO., ET AL., 288 N.W. 847 (Sup. Ct. Minn., 1939); LYMAN LUMBER & COAL CO. v. TRAVELERS INS. CO., 289 N.W. 40; CARTER v. NEHI BEVERAGE COMPANY (U. S. Fidelity & Guaranty Company, Garnishee), 68 N.E. 2d 622 (App. Ct. of Ill.).

NOTE

The exclusion (the definition of the "Products" hazard) is divided into two distinct clauses of about equal length, separated by the only semi-colon in the one sentence exclusion. The first clause excludes accidents arising from handling Reed's products as demonstrated. The second excluded accidents from completed or abandoned operations away from Reed's premises. Under *either* clause, the Johns accident would be excluded.

2. (Second Question, supra). In holding that the representations of the salesman were not "completed or abandoned" operations, the Court of Appeals came squarely into conflict with a decision by the Court of Appeals for the Eighth Circuit on the same point of law. That is the case of STANDARD ACCIDENT INSURANCE COMPANY v. ROBERTS, ET AL., 132 F. 2d 794. In the ROBERTS case construing the same form of policy and exclusion where the assured, an appliance dealer, paid premiums only for the "Premises-Operations" hazard, and not for the "Products" hazard, the Eighth Circuit held there was no coverage for an accident that occurred to a customer during the night following the day when the assured had improperly installed

a gas refrigerator in the customer's home. The reason for the holding was that the accident occurred after completion of the operation of installing, and thus fell within the exclusion. The facts showed that the accident was from leaking gas and the defective installation was a proximate cause, but the Court correctly refused to apply the tort law test of "proximate cause" in construing the insurance contract.

The Fifth Circuit, in the case at bar, held that the operation of Reed's salesman in representing that the grinding machine and wheel were safe was not a "completed" operation until a person such as Johns acted in reliance upon it. The Court ignored the alternative words "or abandoned". The representations were as to the safety of a grinding machine (previously purchased by Johns' employer) when used with a wheel (to be purchased). What more action, spoken or otherwise, did the salesman have to take in connection with that transaction? He had said his piece and was through. It was not only "completed" but also "abandoned". The question before the Court of Appeals was not whether the representations were a proximate cause of the accident, but that is how that Court decided the question. It applied the rules of proximate cause though the real question was whether the representations had been "completed or abandoned" within the meaning of an exclusion in an insurance contract. The liability of Reed to Johns was in part dependent upon whether the representations were a proximate cause of the accident, but the liability of the Insurance Company was contractual and not to be determined upon principles of tort law.

In accord with the Eighth Circuit and contra to the Fifth Circuit are the following: BAKER v. MARYLAND CASUALTY COMPANY, 56 Atl. 2d 920 (Sup. Ct. R.I.); U. S. FIDELITY & GUARANTY COMPANY v. REINHART & DONOVAN COMPANY, 171 F. 2d 681; FOSTER TRAILER COMPANY v. UNITED

STATES FIDELITY & GUARANTY COMPANY, 228 S.W. 2d 107 (1950); BERGER BROS. ELECTRIC MOTORS, INC., v. NEW AMSTERDAM CASUALTY COMPANY, 58 N.E. 2d 717 (N.Y.); KELLEY-DEMPSEY & COMPANY v. CENTURY INDEMNITY COMPANY, 77 F. 2d 85 (10th Cir.); HUTCHINSON GAS COMPANY v. PHOENIX INDEMNITY COMPANY, 288 N.W. 847 (Sup. Ct. Minn.); SMITH v. U. S. FIDELITY & GUARANTY COMPANY, 6 N.W. 2d 81 (Sup. Ct. Nebr.).

Had the "proximate cause" test been applied in any of these cases, a different result would have been reached, but those courts correctly applied principles of interpretation of contracts and thus reached the correct result.

3. It is important that these questions be decided by this Honorable Court (1) because the first question was decided contrary to a Texas decision, and (2) because the second question was decided contrary to a decision of the Eighth Circuit, and (3) because both questions were erroneously decided. In addition, the decision of the Court of Appeals gave Reed "Products" coverage when it had purchased only "Premises-Operations" coverage. Last, but not least, this same form of policy has been and is uniformly used by casualty insurance companies throughout the nation to cover one or more of five different hazards of manufacturing businesses, depending upon the desires of the assured, but with no intention to cover the "Products" hazard unless it has been purchased and paid for. It may be said without equivocation that the decision of the Court of Appeals in this case has been a shock to insurance underwriters generally. In these circumstances, the Insurance Company submits the issues raised warrant authoritative determination by this Court.

Conclusion

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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